No. 87-1751

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT BENNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether retrial of the counts on which the jury at petitioner's first trial was unable to reach a verdict is barred by collateral estoppel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 836 F.2d 1314.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1988. A petition for rehearing was denied on March 9, 1988 (Pet. App. 14-15). The petition for a writ of certiorari was filed on April 18, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was acquitted on one count of conspiring to import cocaine, in violation of 21 U.S.C. 963, and on one count of importing cocaine, in violation of 21 U.S.C. 952(a). The jury was unable to

reach a verdict as to counts charging petitioner with conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner then moved to dismiss those two counts, alleging that retrial on them would subject him to double jeopardy. He also moved to exclude on retrial all evidence relating to the importation counts on which he was acquitted. The district court granted petitioner's motion to exclude evidence relating to the importation counts but denied his motion to dismiss the remaining counts. The court of appeals affirmed.

1. Petitioner was the owner and operator of the Municipal Airport in Lake City, Florida. On November 14, 1984, a small airplane, carrying seven duffel bags containing a total of 135 kilograms of cocaine, landed at the airport. Two persons in the plane, together with the driver of an automobile who met them, were arrested as they drove away from the airport with four of the seven bags. The pilot was arrested in the vicinity later that evening (3 R. 126-130; 6 R. 690; 7 R. 814).

All four subsequently were convicted of importing cocaine, conspiring to import cocaine, possessing cocaine with intent to distribute it, and conspiring to possess cocaine with intent to distribute it. Two of the four then disclosed petitioner's involvement in the schemes. Thereafter, he too was charged in four counts. The two accomplices and others subsequently testified at petitioner's trial (see Pet. 4, 8). The jury acquitted petitioner on the two importation-related counts but failed to reach a verdict on the two distribution-related counts. The district court then denied petitioner's motion to dismiss the two remaining counts, but it ordered the exclusion of evidence relating to petitioner's involvement in a scheme to import cocaine.

2. Petitioner appealed the district court's denial of his motion to dismiss. He argued that the government's entire case against him depended on the credibility of its witnesses and that his acquittal on certain of the counts necessarily implied that the jury disbelieved the prosecution's witnesses. He also claimed that the importation and distribution conspiracies were presented at trial as a single transaction, meaning that his innocence as to either portion of the scheme necessarily implied his innocence as to all of it. Finally, he asserted that, because he presented a single, unified defense to all the charges, the jury's acquittal as to certain of the counts necessarily implied its acceptance of his defense in its entirety. Rejecting each of those claims, the court of appeals affirmed the district court's denial of his motion to dismiss (Pet. App. 6-10).

The court of appeals held that the jury's split verdict refuted each of petitioner's claims as to what the jury *necessarily* had determined. Responding to his assertion that the jury, by acquitting him, necessarily concluded that the government's witnesses lacked all credibility, the court of appeals found "[i]nherent in the split verdict * * * the possibility and even likelihood that the jury accepted some and rejected some of the government witness testimony" (Pet. App. 7). The court of appeals also rejected petitioner's claim that, despite the prosecution's presentation of the evidence as pointing to a single, unified transaction, the jury was unable to sift the evidence before it, accepting certain parts while rejecting others. "This 'sifting' alternative," the court of appeals concluded, "is plausible and even likely given the split verdict" (*id.* at 8). The court continued: "The trial judge charged the jury on two conspiracies, and the very fact that the jury did not acquit * * * on all four counts * * * implies that at least some members of the jury did not interpret the conspiracies

as one" (*id.* at 9). Finally, the court of appeals rejected petitioner's claim that, because he presented a single defense as to all four counts, the jury must have believed it in its entirety. "We have already found * * * that the jury could have believed selective portions of the witness testimony," the court held, and that finding applied to petitioner's case no less than to the prosecution's witnesses (*ibid.*).

ARGUMENT

Petitioner asserts (Pet. 17-28) that the decision below conflicts with this Court's decision in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), and with numerous decisions of other courts of appeals. Those claims are entirely lacking in merit.

1. In *Ashe* v. *Swenson, supra,* Ashe was charged with robbing Knight, one of six persons held up during a poker game. He was acquitted. The state subsequently retried Ashe, charging him the second time with robbing one of the other victims. This time, he was convicted. This Court reversed the conviction, holding that the state was collaterally estopped by the Double Jeopardy Clause from retrying the issue whether Ashe was one of the robbers. The Court observed that "the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not" (397 U.S. at 445). The Double Jeopardy Clause therefore made "a second prosecution for the robbery * * * wholly impermissible" (*ibid.*).

Here, by contrast, the first jury plainly failed to resolve the very question reserved for retrial; namely, petitioner's

involvement in a scheme to possess cocaine with intent to distribute it. Petitioner nevertheless argues (Pet. 20) that his retrial on the possession with intent to distribute charges will result in relitigating the "same facts" that have once been resolved in his favor. Likewise, he again claims (*id.* at 21) that "either [he] was involved in the entire scheme or he was not." The court of appeals, however, rightly observed that "the jury verdict bespeaks a distinction between the two [charged] conspiracies. The trial judge [instructed] the jury on two conspiracies, and the very fact that the jury did not acquit [petitioner] on all four counts * * * implies that at least some members of the jury did not interpret the conspiracies as one" (Pet. App. 9). It therefore does not follow that the jury concluded that petitioner had no involvement at all; had it so concluded, it would have acquitted petitioner on all rather than only half the counts against him.

Indeed, even if petitioner were right in contending that acquittal on the importation-related charges logically required acquittal on the distribution-related charges, it would not at all follow that the doctrine of collateral estoppel should be applied so as to transform his partial victory before the jury into a total victory. To the contrary, if there were a logical inconsistency in the jury's simultaneous acquittal on some counts and failure to acquit on others, it would be clear that the jury did not *necessarily* decide anything. Petitioner would have no right to argue that the verdicts of acquittal were "the one[s] the jury 'really meant.' " *United States* v. *Powell,* 469 U.S. 57, 68 (1984). Given the internal inconsistency in the jury's actions, "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—[would] no longer [be] useful" (*ibid.*).

2. Petitioner also criticizes the court of appeals for applying, as its governing standard in collateral estoppel cases, the requirement that the issue on which relitigation is contemplated be one that the jury necessarily determined in the first trial. He contends that "[t]his standard is * * * unworkable and impractical" and that other courts apply a different standard (Pet. 24).

Petitioner is wrong. It follows directly from the discussion in *Ashe* v. *Swenson*, 397 U.S. at 443-445, that collateral estoppel applies only to those issues necessarily resolved in the defendant's favor at the first trial. Every court of appeals applies that standard. See, *e.g.*, *United States* v. *DeVincent*, 632 F.2d 147, 154 (1st Cir.), cert. denied, 449 U.S. 986 (1980); *United States* v. *Medina*, 709 F.2d 155, 156 & n.** (2d Cir. 1983); *United States* v. *Keller*, 624 F.2d 1154, 1158 & n.4 (3d Cir. 1980); *Hess* v. *Medlock*, 820 F.2d 1368, 1373 (4th Cir. 1987); *De La Rosa* v. *Lynaugh*, 817 F.2d 259, 263 (5th Cir. 1987); *United States* v. *Johnson*, 697 F.2d 735, 740 (6th Cir. 1983); *United States* v. *Gentile*, 816 F.2d 1157, 1162 (7th Cir. 1987); *United States* v. *Barket*, 530 F.2d 181, 188 (8th Cir. 1975), cert. denied, 429 U.S. 917 (1976); *United States* v. *Sarno*, 596 F.2d 404, 408 (9th Cir. 1979); *United States* v. *Addington*, 471 F.2d 560, 567 (10th Cir. 1973); *United States* v. *Boldin*, 818 F.2d 771, 775 (11th Cir. 1987); *United States* v. *Bowman*, 609 F.2d 12, 17 (D.C. Cir. 1979). The cases on which petitioner relies for his claim that there is a conflict among the courts of appeals are not collateral estoppel cases at all but relate to other aspects of the Double Jeopardy Clause.* The claimed "conflict" does not exist.

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* Principally, those cases address the question whether two charged conspiracies are in fact but a single conspiracy, an issue as to which many courts have applied a "totality of the circumstances" test. See, *e.g.*, *United States* v. *Liotard*, 817 F.2d 1074 (3d Cir. 1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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